

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

VINCENT SAVAGEAU,)	
)	
Petitioner,)	
)	
v.)	CV 120-089
)	(Formerly CR 106-092)
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

Petitioner, an inmate at the Federal Correctional Institution in Tucson, Arizona, filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. The matter is now before the Court for an initial review of Petitioner’s motion as required by Rule 4 of the Rules Governing Section 2255 Proceedings for the United States District Courts. For the reasons set forth below, the Court **REPORTS** and **RECOMMENDS** the § 2255 motion be **DISMISSED** on the basis that it is successive and has not been authorized by the Eleventh Circuit Court of Appeals for consideration, and that this civil action be **CLOSED**. The Court further **RECOMMENDS** that Petitioner be **DENIED** a COA and permission to appeal IFP.

I. BACKGROUND

On June 8, 2006, the grand jury in the Southern District of Georgia charged Petitioner, along with three co-defendants, with one count of conspiracy to rob a commercial business, two counts of armed bank robbery, two counts of brandishing a firearm during a crime of violence, and one count of possession of a firearm by convicted felon. See United

States v. Savageau, CR106-092 (S.D. Ga. Jun. 8, 2006) (hereinafter “CR 106-092”). Represented by appointed counsel, William C. Davison, Petitioner pled guilty on September 28, 2006, to one count of conspiracy to rob a commercial business, two counts of armed bank robbery, and one count of brandishing a firearm during a crime of violence, pursuant to a negotiated plea agreement containing a limited appeal and collateral attack waiver provision. Id., doc. nos. 2, 51, 52.

On September 24, 2007, United States District Judge William T. Moore, Jr., sentenced Petitioner to 248 months imprisonment, \$400.00 in special assessments, restitution of \$86,538, and five years of supervised release. Id., doc. no. 77. Judgment entered two days later. Id. Petitioner filed a direct appeal, which the Eleventh Circuit affirmed on October 17, 2008. (Doc. no. 96.) Petitioner filed his first § 2255 motion in this Court on January 30, 2012. See Savageau v. United States, CV 112-016, doc. no. 1 (S.D. Ga. Feb. 7, 2012) (hereinafter “CV 112-016”). Petitioner asserted (1) he was without counsel when he was sentenced in prior state convictions such that those convictions should not have factored into his federal conviction in the underlying criminal case here; and (2) his counsel in his state court cases was ineffective. Id. doc. nos. 1, 2. On August 28, 2014, United States Magistrate Judge W. Leon Barfield recommended Petitioner’s § 2255 motion be dismissed as untimely. Id., doc. no. 2. On February 27, the Court adopted the R&R as its opinion and dismissed Petitioner’s § 2255 motion. Id., doc. nos. 5, 6.

Petitioner filed the current § 2255 motion on June 25, 2020, wherein he argues he should be allowed to file a second or successive § 2255 motion because he was incorrectly determined to be a career offender at his September 24th sentencing. Petitioner does not

report seeking permission from the Eleventh Circuit Court of Appeals to file his numerically second § 2255 motion as to his current claims.

II. DISCUSSION

The § 2255 motion presently cannot be considered because of the successive motion restrictions enacted by AEDPA and now contained in 28 U.S.C. §§ 2255 and 2244(b). Section 2255 provides in relevant part:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h)(2). Section 2244, in turn, provides that prior to filing a successive petition in the district court, “the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A); see also In re Joshua, 224 F.3d 1281, 1281 (11th Cir. 2000) (citing 28 U.S.C. §§ 2255 & 2244(b)(3)).

In Stewart v. United States, 646 F.3d 856, 865 (11th Cir. 2011), the court distinguished between numerically second § 2255 motions and those that were barred as second or successive, holding the petitioner’s numerically second motion was *not* second or successive because the claim asserted therein, improper sentencing as a career offender, was not yet ripe at the time of his first motion because the predicate state convictions had not yet been vacated. In doing so, the Stewart court cited to Leal Garcia v. Quarterman, 573 F.3d 214, 222 (5th Cir. 2009), noting that, like in that case, petitioner’s motion fell within a “small

subset of unavailable claims that must not be categorized as successive.” Stewart, 646 F.3d at 863. The Stewart court further noted that the Fifth Circuit’s approach in Leal Garcia “is consonant with the Supreme Court’s reasoning in” Panetti v. Quarterman, 551 U.S. 930 (2007). Id. at 862.

Leal Garcia explained that “[n]ewly available claims based on new rules of constitutional law (made retroactive by the Supreme Court) are *successive* under § 2244(b)(2)(A): Indeed, this is the reason why authorization is needed to obtain review of a successive petition.” Leal Garcia, 573 F.3d at 221 (emphasis in original). Indeed, AEDPA was specifically designed to protect against prisoners “repeatedly [attacking] the validity of their convictions and sentences” as “the legal landscape shifts.” Id. at 221-22. Likewise, “claims based on a *factual* predicate not previously discoverable are successive,” but if the alleged defect did not exist or did not ripen until after adjudication on the merits of the previous petition, *e.g.*, an order vacating a federal prisoner’s predicate state convictions used to enhance the federal sentence, a claim may be part of a small subset of claims not considered second or successive. Stewart, 646 F.3d at 863 (citing Leal Garcia, 573 F.3d at 221, 222); *see also* Amodeo v. United States, 743 F. App’x 381, 384 (11th Cir. 2018) (*per curiam*) (applying Stewart).

Here, Petitioner has previously filed a § 2255 motion that was dismissed as untimely. See CV CV 112-016, doc. nos. 3, 5, 6.¹ No intervening *factual* defect has come into existence and caused Petitioner’s claim to ripen in the time between Petitioner’s first motion and the instant motion. See Boyd v. United States, 754 F.3d 1298, 1302 (11th Cir. 2014). Petitioner’s latest § 2255 motion revolves around his designation as a career offender at his

¹A court may take judicial notice of its own records. United States v. Rey, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987).

sentencing hearing in September, 2007 and therefore, Petitioner's request is properly classified as "second or successive" in the sense contemplated by § 2255. Leal Garcia, 573 F.3d at 221

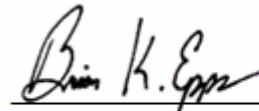
Because Petitioner has not yet received authorization from the Eleventh Circuit to file a second or successive § 2255 motion, this Court lacks jurisdiction to consider Petitioner's claim. See Hill v. Hopper, 112 F.3d 1088, 1089 (11th Cir. 1997) (determining that "the district court lacked jurisdiction to consider Appellant Hill's request for relief because Hill had not applied to this Court for permission to file a second habeas petition").

The Court also recommends denial of a certificate of appealability ("COA") and denial of *in forma pauperis* ("IFP") status on appeal. A federal prisoner must obtain a COA before appealing the denial of his motion to vacate. The District Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts. Applying the COA standards, which are set forth in Brown v. United States, 407 CV 085, 2009 WL 307872, at *1-2 (S.D. Ga. Feb. 9, 2009), the Court discerns no COA-worthy issues regarding the instant § 2255 motion, so no COA should issue. 28 U.S.C. § 2253(c)(1); see Slack v. McDaniel, 529 U.S. 473, 484 (2000) ("Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case . . . no appeal would be warranted."); see also Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000) (approving *sua sponte* denial of COA before movant filed notice of appeal). Since there are no non-frivolous issues to raise on appeal, an appeal would not be taken in good faith. Thus, IFP status on appeal should likewise be denied. 28 U.S.C. § 1915(a)(3).

III. CONCLUSION

Based on an initial review of the motion as required by Rule 4 of the Rules Governing Section 2255 Proceedings, the Court **REPORTS** and **RECOMMENDS** the § 2255 motion be **DISMISSED** on the basis that it is successive and has not been authorized by the Eleventh Circuit Court of Appeals for consideration, and that this civil action be **CLOSED**. The Court further **RECOMMENDS** that Petitioner be **DENIED** a COA and permission to appeal IFP.

SO REPORTED and RECOMMENDED this 2nd day of July, 2020, at Augusta, Georgia.

A handwritten signature in black ink, appearing to read "Brian K. Epps", is written over a horizontal line.

BRIAN K. EPPS
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA